FILE COPY

MAR 3 1945

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 850.

JACK COLE COMPANY, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the Northern District of Alabama.

APPLICATION FOR REHEARING.

JACK COLE COMPANY, INC.,
Appellant.

By: FRANCIS H. HARE,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 850.

JACK COLE COMPANY, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the Northern District of Alabama.

APPLICATION FOR REHEARING.

Comes the Appellant in the above-styled cause and as provided by Rule 33 of the Revised Rules of the Supreme Court of the United States, and within twenty-five (25) days after the Court has entered judgment dismissing said appeal, files this application for rehearing, and the undersigned counsel for Appellant hereby certifies that this petition is presented in good faith and that it is not presented only for delay.

FRANCIS H. HARE,
Attorney for Appellant.

PREFACE.

We make this petition as brief as will permit us to be distinct. The Court will realize that the peculiar nature of the proceeding does not lend itself readily to simplification. Very probably we over-simplified our reply to the Motion to Dismiss in a well meant effort to be formal and brief on unfamiliar ground.

While the memorandum decision of this Court does not disclose why the Motion to Dismiss was sustained, we assume from the contentions of the Appellees that it was sustained on one or more of the following holdings:

1. That this Court will not review the Interstate Commerce Commission in its province of fact-finding in the exercise of a highly specialized judgment on public convenience and necessity.

2. That this rule not to review applies particularly to operating rights applied geographically as distinguished from application to commodities.

3. That if this Court reviews the application by the Commission of principles of law under the Motor Carrier Act to the facts contained in our record, that the record does not show either that erroneous principles of law were applied or that sound principles of law were misapplied to the facts with results so unjust and insupportable as to require correction by this Court.

Appellant seeks a rehearing in this case by this Court because:

1. The correct legal principles necessary to the decision of the case are free from doubt.

2. Both this Court and the Commission have recognized the duty and power of this Court to review the application by the Commission of these legal principles to the geographical aspects of a carrier's operation.

3. The result obtained, tested by logic or tested by precedent, conclusively demonstrates that the order of the Commission here involved was unjust and discriminatory and insupportably repugnant to legal principles which admittedly apply.

Closely analogous precedent may suffice to state our position more briefly and plainly than any other method.

Three irregular-route common carriers of general commodities operated in Birmingham in competition and their record as contemplated by the Motor Carrier Act prior to June 1, 1935, and since, are so closely similar as to lack any substantial distinction. These three carriers were Appellant, Jack Cole Company, Inc., (2) Howard Hall Company, Inc., and (3) Alabama Highway Express, Inc. All three filed their applications under the grandfather clause and the Commission granted as their respective radial bases authority as follows:

1. Jack Cole Company—Birmingham and a radius of 15 miles.
2. Howard Hall Company—Birmingham and a radius of 12 miles.
3. Alabama Highway Express—Birmingham only.

This was the result of the application by the Commission of the principles of law as interpreted and applied by the Commission prior to the decision by this Court of the *Howard Hall case,* 315 U. S. 495.

The Howard Hall Company filed a proceeding similar to this before a Three Judge Court and appealed its decision to this Court, resulting in the decision and the annunciation of principles found in the *Howard Hall case, supra.* As the Commission understood and interpreted and applied those legal principles, they profoundly affected and controlled and changed, both as to commodities and as to geographical scope, the operating authority to which such carriers were entitled.

As a direct result, after the *Howard Hall case* was remanded to the Commission, it received a new order not only expanding its authorized commodities but increasing its radial base to Birmingham and a radius of 65 miles and other points, including Montgomery, Alabama. Also as a result, the Alabama Highway Express Company proceeding, which was then pending as this case is pending, was referred to the Commission for further consideration and a new order of the Commission was entered in that case expanding their operating authority to a radial base of Birmingham, Alabama, and a radius of 65 miles. In other words, the three parallel cases when decided prior to the decision of this Court all were granted a radial base of fifteen miles or less. If no error was committed in limiting Jack Cole Company to a 15-mile radial base, then no error was committed in imposing a similar limit upon the Howard Hall and the Alabama Highway Express operations. Following the mandate of this Court, the error has been admitted and corrected in the Howard Hall case and the Alabama Highway Express case.

The error in the Jack Cole Company case stands uncorrected.

It seems plain and distinct to us, and it seems to us unthinkable and a denial of an equal protection of the law, that this Appellant alone, on three parallel and analogous records, should be limited to the operating rights granted them under the principles of law as they were understood prior to this Court's great decision in *Howard Hall Company* v. *United States,* 315 U. S. 495, while in the instance of his two competitors the same mistake has been admitted and relief granted.

An error in the understanding or in the application of correct legal principles in all three cases is implied and demonstrated by the new orders given to Howard Hall and Alabama Highway Express as to their geographical scope. Does that not suffice to the end that this Court will conclude that at least a substantial question is presented for review

by this Court in order that we may have an opportunity to brief this case on its merits and submit it for this Court's decision?

In such a brief we would parallel the following:

1. The original orders granted to each of these three common carriers.

2. A brief digest of the three records so far as pertinent and material.

3. The present orders granted to the three similar carriers showing the relief granted the other two and the uncorrected mistake and injustice of the order in the Jack Cole case.

In the following case this Court has taken cognizance of geographical scope of operations:

Alton R. Co. v. *United States*, 315 U. S. 15.

As to that part of the order which denied this Appellant operating authority in Mississippi, Louisiana, and North Carolina for lack of continuity after June 1, 1935, although the Commission had previously found that Appellant was entitled to the authority in those States by reason of sufficient continuity prior to June 1, 1935, the Commission has affirmatively misapplied the law. Such lack of continuity after June 1, 1935, must amount to an abandonment of the operation. The record repels that assumption because (a) the fact that certain trips were made after June 1, 1935, even if not frequent, shows that the carrier had not abandoned the territory. (b) The correct legal principles as to whether or not service is reasonably continuous take into consideration the nature of the circumstances prevailing. Current contemporaneous orders of the Commission embodied in this record constituted instructions from the Commission to Jack Cole Company or an interpretation of the extent of continuity that would be

expected of Jack Cole Company, and the operation in those States was a full compliance with that interpretation. (c) There was never any proceeding or citation from the Commission to Jack Cole Company on the basis that his service was not reasonably continuous, but rather the Examiner for the Commission reiterated that he found that the Applicant's operation in stated parts of this territory denied by the Commission, was a bona fide continuous operation.

In conclusion, a brief on the merits, which we take it would be premature here, would show that this order denying this Applicant the operating authority as to which relief is sought was written at a time when the Commission conceived that the rights of irregular-route common carriers were to be determined with disfavor and that since this Court's controlling decision in the *Howard Hall case, supra*, the Commission correctly applies the law to irregular-route common carriers fairly and impartially. It is only necessary that this Court remand this proceeding to the Interstate Commerce Commission for further proceedings not inconsistent with its determination of the Howard Hall appeal and justice will then be done this Appellant and an unthinkable discrimination relieved and corrected.

Respectfully submitted,

JACK COLE COMPANY, INC.,
Apellant,

By FRANCIS H. HARE,
Attorney for Appellant.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at Washington, D. C., this 3rd day of March, 1945.

.....

FRANCIS H. HARE,
Attorney for Appellant.

.....

By WILMER A. HILL,
Of Counsel.